United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL
WITH PROOF
OF SERVICE

74-2589

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P/S

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

AHARON RON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT

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Preliminary Statement

This is an appeal in a criminal proceeding from an order denying a motion pursuant to Rule 33 of the Federal Rules of Criminal Procedure for a new trial on the ground of newly-discovered evidence. The order was made by the Hon. Charles L. Brieant, Jr., United States District Judge, in the Southern District of New York, on November 18, 1974 (A24-A46).*

The order held in abeyance determination of a motion

* "A," as used here, refers to the agreed appendix.

pursuant to Rule 35, F.R. Cr. P., for a reduction of sentence, which was made jointly with the Rule 33 Motion (A24). No question is presented, therefore, under the Rule 35 motion.

The Questions Presented

1. Did not the testimony of the Government's chief witness against appellant, given at a trial subsequent to appellant's trial, concerning the dates on which and the circumstances under which the two men had met and talked with each other, demonstrate that the witness's testimony on the same subject at appellant's trial was perjurious?

2. Assuming that the answer to Question No. 1 is in the affirmative, need the evidence of perjury referred to in that question, in order to serve as the basis for a new trial, be of greater probative value than that it "might" lead to a different verdict at the new trial, or must it, in the absence of evidence of prosecutorial misconduct in connection with the perjury, be of such force that it "probably would" lead to such a verdict?

3. Assuming again that the answer to Question No. 1 is in the affirmative, is not the evidence of perjury referred to in that question of sufficient probative value to serve as the basis

for a new trial under whatever standard is applicable to evidence offered for such purpose?

4. Is not the testimony of a person who was indicted, but not tried, together with appellant, and who at the time of appellant's trial was known to appellant and known to have knowledge of facts favorable to appellant's case, but who was then in prison in Canada and had clearly indicated that he was not willing to testify at appellant's trial unless granted immunity, "newly-discovered" when given at such person's separate trial several months after appellant's trial?

Statement of the Case

Appellant Ron was convicted on March 5, 1973 after trial on six counts of a seven-count indictment (A5). He was sentenced on April 9, 1973 to five years' imprisonment on each of the first three counts, concurrently, and an additional five years' imprisonment on each of the remaining counts, concurrently with each other, but consecutively with the first three counts, for a total of ten years' imprisonment (A6). He was also fined $5,000 (A6). His conviction was affirmed by this Court on October 31, 1973 (A9), and his petition for certiorari was denied by the Supreme

Court on April 15, 1974 (A13).

Ron was indicted with six other men on February 24, 1972 -- Mannie Lester, Louis Beck, William Champion, Collin Garner and Frederick Lee (A1, A16-A23). All were charged with four counts of wire fraud (18 U.S.C. § 1343), one count of mail fraud (18 U.S.C. § 1341), one count of transporting goods across international boundaries as part of a scheme to defraud (18 U.S.C. 2314), and one count of conspiring together to commit all of the foregoing offenses (A1, A18-A23). In essence, however, it was the Government's claim that the seven men, together with one Joseph Hagins, had conspired to, and did in fact, steal and sell certain securities (A16-A18, A20-A23). Hagins was not indicted, and appeared at the trial as the Government's chief witness (RT 353 et seq.).*

All of those indicted, however, were not tried together, since Lester, who, it seems accurate to say, the Government claimed to be the ringleader of the conspiracy or, jointly with Hagins (the Government's key witness), the co-ringleader, was serving a prison sentence in Canada at the time of the trial

* "RT" refers to the transcript of the first of the two trials with which this appeal is concerned, hereinafter "Ron's trial."

of Ron, Beck, Champion, Lee and Garner (LT46-LT50).* Lester had been convicted in Canada on charges arising out of some of the same transactions as those with which the (U.S.) Government claimed Ron and his co-defendants were connected, but not the same charges (LT4062-LT4063). Thus, Lester did not appear at Ron's trial either as a defendant or as a witness.

At Ron's trial, the jury found Garner and Lee (as well as Ron) guilty of participating in the conspiracy, although not guilty on the more specific counts (A5). The jurors reached no verdict concerning Beck on any of the counts, and no verdict concerning Champion on the conspiracy count, although they found him not guilty on the other counts (A5). Thus, Beck had to be retried on all counts and Champion on the conspiracy count. They were retried in November and December of 1973, in the proceeding hereinafter called "Lester's trial" (A10-A11).

At that second trial, all three defendants, Lester, Beck and Champion, were acquitted on all counts for which they were tried (A11). There, Lester not only appeared as a defendant, but also took the stand as a witness, and even acted as his own attorney, although assisted by a court-appointed at-

* "LT" refers to the transcript of Lester's trial.

torney (LT4043-LT4165). It is Ron's position on this appeal, however, as it was in the court below, that, through circumstances beyond his control, the testimony of Lester was not available to Ron at his trial, and that had it been available to him at that time it would have resulted in his acquittal just as surely as it led to the acquittal of Lester, Beck and Champion. Well before Ron's trial, Lester had let it be known that he would not testify at that trial unless granted immunity (A41; Ct. Exh. 6).

As indicated above, at both trials, Hagins was the Government's key witness, and his testimony constituted the only evidence that Ron had the slightest knowledge of the existence of a conspiracy to sell stolen securities. It is equally Ron's position that the record of the two trials, and particularly the documentary evidence, discloses that Hagins' testimony at Lester's trial demonstrates beyond even a reasonable doubt that the Government's key witness perjured himself at Ron's trial when he testified concerning the dates on which and circumstances under which he met with Ron, and that had the true facts been made known at that time they would also have gained him an acquittal.

Specifically, it is Ron's position that Hagins' testimony at Lester's trial demonstrates beyond any doubt that Hagins' earlier

testimony at Ron's trial to the effect that the two men had met and talked with each other in furtherance of an ongoing conspiracy was and is a bald lie. Hagins' later testimony shows that the two men had never met, talked or otherwise communicated with each until November 19, 1969, which was several days after the alleged conspiracy had already ended with Lester's arrest on November 13, 1969 (below, p. 18 et seq.).

The Facts

(What follows is actually the Government's case, and is based largely on Hagins' testimony, except where some interpolation is essential to explain Ron's position on this appeal. As already indicated, that testimony is not accepted by Ron as true in almost any respect, but it is hoped that this introductory caveat will make it unnecessary to clutter the ensuing recitation with repeated allusions to that fact.)

According to Hagins, he had known Lester for "less than a year" when, in October, 1969, he went to see Lester concerning an apparently illicit transaction that Garner, whom Hagins had just met, wished to consummate (RT367-RT368, RT378-RT389). Lester was not interested in Garner's proposed transaction, but he

asked Hagins if the latter could get his hands on stolen securities (RT395-RT396, RT399). At a subsequent meeting with both Hagins and Garner, Lester said he could arrange to sell such securities at their full market price, and pay 50% of the proceeds to his source (RT399-RT400). Thereupon Garner introduced Hagins to Lee and Champion, who indicated that they would be responsible for obtaining the stolen securities, but that they would hold Hagins accountable for getting their share of the proceeds of sale from Lester (RT401-RT403, RT412-RT416).

Thereafter, Garner produced and, in the company of Hagins, delivered to Lester approximately $850,000 worth of stock warrants all of which were issued by Leasco Data Systems Corporation and a substantial portion of which were registered in the name of Goodbody & Co. (RT517-RT519, RT524). Garner also brought along a tax stamp of Goodbody & Co., which was affixed to the warrants in "street" name, making those warrants readily negotiable in appearance (RT522). The remaining warrants were put aside to be throwr away (RT520-RT521).

Although Lester at first agreed with Hagins and Garner that he would pay them 50% of the current market price of the warrants within ten days, he subsequently advised them it would take considerably longer to sell so large a block of warrants without

depressing the market price, and he asked them to give him more time (RT529-RT530). They did so, but they became impatient, and, through Hagins, pressed Lester for some payment (RT530-RT534).

Lester (not Ron) then gave Hagins a check signed by Ron, whom Hagins and the Government concede Hagins did not know at the time (A54-A55, A59). The date on which this check was thus turned over to Hagins was during the first week of November, 1969 (A55). The court below in its opinion identifies this check as being one "in the amount of $4,600" (A28), but that is not the way that, at Ron's trial, Hagins described the first check. At Ron's trial, Hagins testified that the first check was for $5,000 (A56-A57), and he did not identify it by reference to an exhibit, nor was he asked to do so. It was only at Lester's trial, after Ron had been convicted, that Hagins stated that the first check was for $4,600, and identified it as Government Exhibit 34 (A82-A84, A92-A94). The crucial significance of this change in testimony will be explained below.

At the same time as he turned over the aforementioned check, Lester is supposed to have given Hagins Ron's telephone number so that, as the court below notes in its opinion, "through Ron, Hagins could locate Lester at any time in furtherance of the affairs of the conspiracy" (A28-A29, A56; emphasis supplied).

Hagins cashed the check in New York City's "diamond center" (46th Street between Fifth and Sixth Avenues) with a man named "Mordecai," who gave him the lesser amount in return (A57). Subsequently, however, Hagins was told by "Mordecai" that the check had been returned for insufficient funds (A57-A58). "Mordecai" gave the check back to Hagins, who brought it to Ron, to whom he repeated what "Mordecai" had told him (A58-A59). This, Hagins and the Government concede, was the first time that Hagins had ever come into contact with Ron (A59) so that the identification of this first check and, even more importantly, the first date on which it was physically available to Hagins to take to Ron is of crucial importance. More will be said on that subject bel[illegible]

Ron supposedly thereupon went with Hagins to Ron's bank, cashed the check that Hagins had returned to him, and gave the cash to Hagins (A60-A63). The date is supposed to have been during the first week of November, 1969, just two days after the delivery of the first check (A58). The court below describes the second check as "another check for $5,000" (A29), which, of course, it could not be if, as the court previously states in its opinion, the only previous check concerning which Hagins had testified had been for $4,600. What undoubtedly accounts for this

verbal slip on the part of the court below is that, at Ron's trial, Hagins testified that at the same time Ron had given him the check for $4,600, which, at the earlier trial, was identified as the second or "cover" check, Ron had also given him a third check for $5,000 (A63). Thus, indeed, at least at Ron's trial, there was mention of "another check for $5,000."

After the occasion on which Ron gave Hagins the cover check, the two men met on two or three more occasions, within the same week (A60, RT545). On those occasions, to use the language of the court below "they discussed the stolen securities, and the investments Ron and Lester planned to make with their share of the loot" (A29, RT545-RT548; emphasis supplied). At one time, and this is also the language of the court below, "Ron knew that Lester was registered at the Belmont Plaza Hotel in New York under the false name of Emery, and told Hagins to take his money demands direct to Lester at that address" (A29, RT564; emphasis supplied). Clearly, Hagins' entire testimony concerning Ron depicted the two men as having met and talked with each other in the course and context of an ongoing conspiracy.

Moreover, although there is no mention of it by the court below, Hagins also testified that, on one occasion when he

visited Ron at the latter's apartment, he was introduced by Ron to Beck, was told by Ron that Beck could be trusted, and was then asked by Beck whether he (Hagins) could get some more securities of the type that were the subject matter of the alleged conspiracy (RT557-RT562).

As Ron concedes in the affidavit submitted in support of the motion in the court below, he did in fact know Lester, but not as a fellow conspirator, and he did in fact give Lester checks, but not in connection with any conspiracy (A48-A49). He had been introduced to Lester by their common attorney, who had told him that Lester could be helpful in arranging for the sale of property in New Jersey in which Ron had been given an interest by Beck (A48-A49). The property was and is valuable because it is zoned for use as a cemetery (A48). Lester had thereafter indicated sufficient probability of arranging its sale to persuade Ron to give him an advance on the commission to which Lester would become entitled (A49). Lester had asked that the advance be made in the form of separate checks in varying amounts to unspecified payees so that he could pay some debts he owed, and Ron had given him such checks (A49).*

Ron introduced Lester to Beck, whom Ron had met

* Hagins admitted that he inserted his own name as payee on the first two checks of Ron given to him, regardless of who gave them to him (A70).

through mutual acquaintances, and with whom Ron shared a variety of interests ranging from religion to finance (RT1749-RT1758, RT1774-RT1778). Beck was an attorney with legal and business connections in the Bahamas and, when asked by Lester to sell some securities abroad for a Canadian represented by Lester, he agreed to do so (RT1779-RT1787).

It was Beck who arranged for the sale of approximately $300,000 worth of the warrants in question through the agency of the Rawson Trust Company in the Bahamas, which, in turn, used as its stock broker the well-known firm of Hayden Stone & Company in New York City (RT188-RT194, RT199-RT218). Beck also arranged for the transfer of the proceeds of the sale from the account maintained by the Rawson Trust Company in the Chase Manhattan Bank in New York City to an account in the name of Martin C. Van Beuren in a branch of the Bank of Montreal located in Toronto, Canada (RT262-RT282). Beck, and also Ron, had been told by Lester that Van Beuren, a Canadian, was the owner of the warrants and Lester's principal (RT1811-RT1813).

Thereafter, Lester obtained two drafts in the amounts of $70,000 and $20,000 drawn on the Canadian bank, which he exchanged for nine drafts of $10,000 drawn on the agency of that bank

in New York City (RT1114-RT1127). He then went to the Franklin National Bank in this City, together with Beck and Ron, where, using the name "Van Beuren" as his own, he persuaded the local bank to cash one of the drafts for $10,000, and he gave the other two to Ron (RT1164-RT1186). Lester flew to Toronto on the next day, and was arrested by the Canadian police on his arrival (RT1275-RT1281, RT449-RT450). The date was November 13, 1969; the time, between 8:00 a.m. and 9:00 a.m. (RT450). The central importance of that fact will be explained below.

Before the Government's case and Hagins' testimony are put aside, for the moment, some facts concerning Hagins personally that were developed at the two trials at which he testified should be emphasized. At the time of Ron's indictment, the Government's key witness was awaiting sentence in two separate criminal proceedings in the Southern District of New York, in which he had pleaded guilty to charges wholly unrelated to those against Ron and the latter's co-defendants (RT596-RT599). At his request, those two cases had been consolidated for sentencing before Judge Tenney (RT598-RT599, RT663-RT667). A previous indictment in New Jersey had been dismissed (RT600-RT601).

Lester's Testimony

At his trial, Lester vigorously and in detail controverted each and every part of Hagins' testimony. He denied ever having met, talked to or known of Hagins prior to the latter's appearance as a Government witness (LT4106). Thus, he necessarily denied ever having given Hagins Ron's name or telephone number for any purpose, no less in order that "through Ron, Hagins could locate Lester at any time in furtherance of the affairs of the conspiracy" (A28-A29).

Lester also denied that he had received the warrants in question from or through Hagins, either directly or indirectly. He testified that he had obtained the warrants from several residents of Florida after extensive negotiations with them in Miami and in Nassau in the Bahamas (LT4083-LT4095). He identified the men by name, and gave the dates and places where he had met with them in Miami and Nassau, the names of the hotels at which he had stayed on those occasions and the names of individuals, including a well-known Bahamian attorney whom he had visited on one of the occasions (LT4083-LT4090). He pointed out that he had received from the Florida group warrants in excess of those he had turned over to Beck for sale, and that he had arranged for

the sale of the other warrants through other persons in New York City, whom he also identified by name (LT4093-LT4098).

Lester's testimony that he had never met Hagins was corroborated in dramatic fashion. When cross-examined by Lester, Hagins had testified that the two men had been introduced by two others, "Joey" Epel and Julius "Swartz," and that "Swartz" had told Hagins that Lester dealt in "hot" securities (LT636-LT677). Hagins further identified the two alleged intermediaries by giving their current addresses and they were thereafter brought to court as witnesses at Lester's trial under compulsion of subpoena (LT3649-LT3672, LT3983-LT4001). They readily testified that they had known Hagins casually (LT3652-LT3653, LT3984-LT3985), but they flatly denied that they had ever met, talked to, communicated with or heard about Lester under any name (LT3650-LT3651, LT3983-LT3984).

In addition, Lester controverted the claim alluded to by the court below in a footnote that "Ron was ... at the Belmont Plaza Hotel at the same time as Lester and in company with him there" (A45). That claim was based solely on a registration at the hotel in the name of a "Rabbi Rhone" (not "Ron"; GX 39). Lester explained that he had rented the room for the use of an Israeli delegation that had included a rabbi by that name who was

a major in the Israeli Air Force (LT4100-LT4102). Lester described the Major as "a huge man about six, four, [who] weighs about 250 pounds." Defendant Ron is a tiny man, who is approximately five feet tall, and weighs about 100 pounds.

Before Ron's trial, Lester had been ordered by a Canadian court to give a deposition in a civil action brought by Goodbody & Co. to establish its alleged right to the proceeds of the sale of the warrants that are the subject matter of this proceeding, and in that deposition he had presented the same version of the manner in which he had obtained the warrants that he later gave at his trial in the Southern District (A37; Ct. Exh. 5). That deposition, however, was under compulsion of a Canadian court's order. At a later date, still prior to Ron's trial, when Lester was interviewed by the Federal Bureau of Investigation, he flatly refused to answer any questions unless and until he was assured of immunity from prosecution by the United States Government (A41; Ct. Exh. 6). In a letter to Ron, before the latter's trial, Lester advised Ron to do the same (A42; a copy of this letter is annexed to the affidavit of Bart Schwartz, Esq., dated 7/1/74, and was submitted to the court below in opposition to the motion for a new trial). Even after Ron's trial, when Lester was in the

Federal Detention Headquarters in New York City, awaiting his own trial, he refused to give Ron any information in support of Ron's contemplated motion for a new trial (A51).

Lester is now dead (see affidavit of Stanley Geller, Esq., dated 5/24/74 and submitted in support of the motion for a new trial, p. 6). As appellant's accompanying memorandum demonstrates, however, Lester's testimony, as recorded at his trial, may be used by Ron at a new trial.

POINT I

HAGINS' TESTIMONY AT LESTER'S TRIAL CONCERNING HIS DEALINGS WITH RON DEMONSTRATES THAT HIS TESTIMONY AT RON'S TRIAL ON THE SAME SUBJECT WAS PERJURIOUS IN VIRTUALLY ALL RESPECTS, AND MEETS EVERY TEST REQUIRED OF EVIDENCE PUT FORWARD AS THE BASIS FOR A NEW TRIAL.

From the foregoing statement of Hagins' testimony, certain facts are beyond dispute, and were conceded by the Government in the court below. The most important of these facts is that Hagins did not meet, speak to or otherwise communicate with Ron until the Government's key witness came to Ron with a check signed by Ron that had been returned or "bounced" by the bank for insufficient funds (A59).

It bears emphasizing that Hagins came to Ron with the check in hand. In other words, the Government's witness did not merely advise Ron that the latter's check had "bounced"; Hagins had the check with him when he met Ron. This, of course, would be a foregone conclusion, even if it did not appear in the testimony, since the holder, or professed holder, of a check is not likely to convince, or even to try to convince, the maker that the check has "bounced" unless the holder is able to exhibit the instrument itself. Otherwise, the maker has no way of knowing that the holder has not actually cashed the check, and is seeking to be paid twice, especially if they are strangers to each other, as were Hagins and Ron.

In any event, in this instance, the fact that Hagins came to Ron with the check in hand, and that the two men then went to the bank and cashed it was part of Hagins' sworn testimony at both trials. Here is what he stated concerning the matter at Ron's trial:

> "Q Did you have a conversation with him about this check?
>
> A Yes we did.
>
> Q Tell us what you said, in substance, to Mr. Ron and what Mr. Ron said to you.

A I told him that the check bounced, it was no good, and he told me that the check was good, that he would take me to his bank and he would prove it.

* * *

Q When he said he would take you to his bank, did you agree to go to his bank?

A Yes.

Q Do you remember where that bank was?

A 39th Street and Seventh Avenue.

Q What was the name of it?

A It is the Israeli Discount.

Q What happened there?

A He wrote me another check, and as I recall, he was able to get the cash for the original check. I had to replace the money that I had received from the individual on 46th Street" (A59-A61; emphasis supplied).

The Government's key witness put the matter even more clearly at Lester's trial:

"Q By the way, this check, Government's Exhibit 34, was that ever returned to you by Mordecai?

A Yes, it was, sir.

Q Do you remember, was that prior to the time you got the check from Rabbi Ron, the $5,000 check or afterwards?

A Yes, I returned that check to Rabbi Ron.

Q Prior to the time he wrote out the second check?

A At the time that he wrote out the second check.

Q So, in other words, sir, the second check was written out on November 7th, according to your testimony, and on that date you returned to him the first check; is that correct?

A That's correct" (A92; emphasis supplied).

The next fact that is indisputable is that the check for $4,600 (GX 34) shows on its reverse side that it was accepted and cashed by the bank on which it was drawn, the First Israeli Bank, on November 19, 1969 (A119), and Ron's monthly bank statement (GX 37) reveals that although the check in question was originally presented at the First Israeli Bank on an earlier date, November 6, 1969, it was rejected for insufficient funds at that time, and that it was accepted and cashed only when presented for a second time on November 19, 1969 (A122). In case there is any doubt about what the documents show on their face, that doubt is dispelled by the testimony of Ryan, the officer of the First Israeli National Bank who, like Hagins, appeared as a Government witness at Lester's trial (A102-A103, A110-A111). Ryan offered the further advice that the stamp of the Merchants Bank of New York on the reverse side of the check for $4,600,

which is dated November 12, 1969, indicates that the check was deposited by the holder in that bank on that date for presentment to the First Israeli Bank, so that it could not have been returned to the depositor, and by the depositor to Hagins, and by Hagins to Ron, until several days after November 12, 1969 (A106-A107).

The vital significance of the foregoing is that once it is established that the check for $4,600 was the first check signed by Ron that came into Hagins' possession, it is clear that Hagins did not meet Ron until several days after November 12, 1969, and, more specifically, that the two men did not meet until November 19, 1969, which was the date when the check was cashed.

That fact, however, did not emerge at Ron's trial because Hagins then testified that the check for $4,600 was the second check signed by Ron that came into Hagins' possession, and that there was a prior check for $5,000. Moreover, the Government did not produce the alleged prior check for $5,000. Thus, there was no way of fixing the date on which Hagins met Ron, and the clear indication was that it must have been on or before the date on which the check for $4,600 was signed,* since that check was, supposedly, the second or "cover" check, given to reimburse Hagins (or "Mordecai") for the alleged first check.

*November 3, 1969 (A118).

In its opinion, the court below appears to say that at Ron's trial, on direct examination, Hagins did in fact state that the check for $4,600 was the first check, and the check for $5,000 was the second check, and that it was only after vigorous cross-examination that he became confused and stated it the other way around (A36). That statement by the court below is doubly unwarranted. First of all, the record clearly shows that, on direct, Hagins testified that the first check was for $5,000, that the second check was for $4,600 (GX 34), and that there was a third check for $5,000 (GX 35), which is precisely the way the witness testified on cross-examination. Here is Hagins' testimony on direct:

"Q Now sometime after this, Mr. Hagins, did you receive a check from Mr. Lester?

A Yes, I did.

* * *

Q Can you describe the check?

A It was a check drawn on Hechal Shalom.

* * *

Q What was the amount?

A Approximately $5,000.

* * *

Q Now, what did you do with the check?

A I took the check to an individual that I was familiar with on 46th Street.

Q Was this the same day you had received it?

A Yes, it was.

Q Where on 46th Street did you go?

A The Jewelry Diamond Center.

Q What happened?

A I cashed the check.

Q Do you remember how much cash you received?

A I discounted the check, and I received the difference between the discounted value and the $5000.

* * *

Q You mean the difference between the discount and the $5000, you received the discounted value back?

A That's right.

Q Do you remember how much that was?

A Approximately $4600.

[This first check is then returned by "Mordecai" to Hagins to Ron, who gives Hagins further checks.]

Q I show you a check which has been marked for identification purposes Government Exhibit 34 [$4600]. Can you examine that, the front and the back of it, and then tell us whether you recognize it?

A Yes.

Q How are you able to recognize it?

A It has got my signature on it.

Q On the back?

A Right.

Q Is this one of the checks which you received from Mr. Ron as you have testified?

A Yes, it is.

Q By the way, the name Hechal Shalom is that the same as Hershel Shalom, Inc., which is on the check?

A Yes, it is.

MR. HOROWITZ: Government offers --

THE COURT: Is that claimed to be the first check or the second check?

MR. HOROWITZ: That is something we will have to straighten out, your Honor.

* * *

Q Government Exhibit 35 for identification, do you recognize that by examining the front and back of it?

A Yes, I do.

Q How do you recognize it?

A It was made out to me and I signed it.

Q Was this given to you by Mr. Ron as well?

A Yes, it was.

Q Placing 34 and 35 before you, can you tell us which of those you received first?

* * *

A The check for $4600 is the --

THE COURT: Just give the number of it, if you would, the exhibit number, the little red number.

A Number 34 is the amount that was drawn to --

MR. STONE: Objection, your Honor, to his characterization of what it is.

THE COURT: The only question is which of them you received first in time. Isn't that the question?

THE WITNESS: I received both of them at the same time.

Q You received both of these at the same time?

A Right.

Q And the one which is 34 for identification, the one which is in the amount of $4600, what was that drawn for in that amount?

A That was drawn to replace the amount of money that I had received from the individual that cashed it, the original check.

Q Were both of these checks cashed that same day?

A Yes, they were" (A54-A63; emphasis supplied).

Moreover, contrary to what is stated in the opinion of the court below, Hagins' ultimate statement on this matter at Ron's trial was not made under intensive cross-examination, but as the result of a question asked by the court itself! Here is what appears in the record:

> "Q Please tell me the amounts of the checks that Ron gave you, starting from the first check -- I am talking only of the checks with your name on.
>
> A A $4600 check, a $5000 check, a $1400 check.
>
> Q Those are the only three checks that Ron ever gave you?
>
> THE COURT: Are you including in there the check that he says Lester gave him?
>
> MR. STONE: I will add that.
>
> Q Is that included -- do those three checks include the check that Lester gave you?
>
> A No.
>
> Q How much was the check that Lester gave you?
>
> A Five thousand" (A74; emphasis supplied).

It was only at Lester's trial that, on direct examination, without any hesitation, Hagins made it clear that the first check was for $4,600 (GX 34) and thus made it equally clear that he did not meet Ron until the day that check was cashed on No-

vember 19, 1969:

"Q Did there come a time when you actually received something from somebody? The answer to that is either yes or no.

A Yes.

Q From whom did you receive something?

A I received a check from Mr. Lester.

* * *

Q From whom did you receive the something that you received?

A I received a check for approximately $5,000 from Mr. Lester.

Q Would you mark this please, Government's Exhibit 34, for identification.

(Government's Exhibit 34 marked for identification.)

MR. VELIE: Will you mark this Government's Exhibit 35 for identification.

(Government's Exhibit 35 marked for identification.)

Q I show you Government's Exhibit 34 for identification, and ask you if you can identify what that is?

A Yes, that is the check I received.

Q That is the check that you received?

A Yes.

Q It is a copy of the check you received, is

that correct?

A It's a copy.

* * *

Q Does it refresh your recollection to look at it?

A In regard to what?

Q To what the description and nature of the check was, the amount, who it is drawn on?

A It's drawn to $4,600" (A82-A84; emphasis supplied).

In light of the foregoing, it seems fair and accurate to say that the court below misses the entire thrust of Ron's position on Hagins' testimony when it dismisses the dramatic change in that testimony between Ron's trial and Lester's trial as if it were an "insignificant variance" in the witness' testimony at Ron's trial which might have been "faulty, confused and inconsistent," but was not "deliberate lying." Hagins' testimony at Lester's trial demonstrates that he could not possibly have met and talked with Ron in furtherance of the alleged conspiracy because when the two men first met that conspiracy was over and done with. A witness may innocently or negligently make a mistake about the number of checks he once received from another person or the order of the checks or the amount of

each check, but he cannot reasonably be assumed to be mistaken about whether or not he plotted with the other person to effectuate the sale of stolen securities. In this case, Hagins' errors concerning details that might in and of themselves have been of no consequence serve to reveal that the substance of his testimony is rotten with perjury.

Thus, as the opinion of the court below reveals, Hagins' testimony at Ron's trial convinced the court -- and presumably the jury as well -- that Lester "gave Ron's telephone number to Hagins at some time so that through Ron, Hagins could locate Lester at any time in furtherance of the affairs of the conspiracy" (A28-A29), and that Hagins thereafter had met and talked with Ron in furtherance of the alleged conspiracy. Any such view of the relationship between Hagins and Ron, however, cannot reasonably be maintained in light of the fact that Hagins did not even meet Ron until several days after Lester had been arested and the alleged conspiracy had come to an abrupt end!

More specifically, at Ron's trial, Hagins led the court below and the jury to believe that "Ron knew that

Lester was registered at the Belmont Plaza Hotel in New York under the false name Emery, and told Hagins to take his money demands direct to Lester at that address," and Hagins had subsequently gone to the Belmont Plaza and had spoken to Lester at that hotel (A29). Such advice, however, could hardly have been given by Ron or, if given, followed by Hagins, if, as is indisputably the fact, when the two men first met and spoke to each other, Lester had already been languishing in a Canadian jail for a week or more!

Again, at Ron's trial, the Government's key witness persuaded the court and jury that, after their first meeting, Hagins "saw Ron two or three times, [and] they discussed the stolen securities and the investments Ron and Lester planned to make with their share of the loot" (A29). Indeed, when Hagins and Ron first met and talked, the "loot" was safely under the control of the Royal Canadian Mounted Police!

Lastly, at Ron's trial, Hagins testified (in this instance without apparently fully convincing the court below, which does not mention this particular bit of testimony in its opinion, or the jury, which could not agree on Beck's guilt

or innocence) that the Government's key witness had been introduced by Ron to Beck at Ron's apartment on one of the occasions that Hagins came to see Ron at that apartment, and that Beck had asked Hagins if he could get his hands on more of the securities that Beck was then arranging to sell on behalf of Lester. Of course, no such meeting or conversation could have taken place if, as is indisputably the fact, Hagins did not even meet Ron until after the securities in question had been revealed to the world at large as having been stolen.

It may reasonably be asked why, if in fact Hagins did not come to Ron in furtherance of the alleged conspiracy, the Government's key witness came to Ron at all. The answer to that question is not only simple and clear; it serves also to corroborate in still another way that Hagins lied when he testified he had come to Ron before the end of the alleged conspiracy. Hagins came to Ron for only one reason: because Hagins knew that Lester, the man who concededly had given Hagins the check for $4,600 that had "bounced," and the man who owed Hagins the face amount of that check, was already in jail in Canada, and thus Hagins knew he would never get the money in question from Lester. The only

person, therefore, from whom Hagins could have recovered the money was Ron whose name appeared on the check as the maker, and so he went to Ron and met and talked with him for the first time -- after Lester had been jailed and the conspiracy had terminated.

It may also reasonably be asked what did Ron really say to Hagins, if they did not meet and talk as fellow members of an ongoing conspiracy, but rather as two men whose only connection was a mutual acquaintance who had one week before been arrested in a foreign city. The truth concerning that matter is also available from Hagins' mouth, but in this instance, it does not come from his testimony at Lester's trial, but from his statement to the F.B.I. prior to Ron's trial, which was read to the grand jury and led to Ron's indictment (GX 3516). In that statement, Hagins told the F.B.I. that when the two men first met, Ron had asked Hagins whether the warrants in question had been stolen.

Now, if these men were really co-conspirators, and if Ron was, as the court below suggests, the financial backer of the alleged conspiracy, it is inconceivable that Ron would, on meeting Hagins, have had to ask whether the

warrants had been stolen. It seems clear, on the other hand, that Ron did so because Lester's arrest had, for the first time, brought home to him, as it did to Beck, to Rawson Trust Company and to Hayden, Stone & Co. that Lester might have been involved in some illegal activity.

Significantly, when, at Ron's trial, on direct examination, Hagins was asked the substance of his conversation with Ron at their first meeting, he made no mention of Ron's question to him, and Government counsel made no effort to bring that particular fact to the attention of the jury. Of course, in the light of Hagins' testimony on direct examination, it served no purpose of Ron's counsel to refer to Hagins' statement to the F.B.I. on cross-examination. This was so at that time, because if, as Hagins' testimony on direct had indicated, the two men had met before Lester's arrest and prior to the termination of the alleged conspiracy, Ron's question would have served only to implicate him in an on-going conspiracy. Hagins had told the F.B.I. that he had answered Ron's question in the affirmative. Any action, therefore, that Ron had thereafter taken would have been taken with knowledge that the warrants in question had been

stolen and would have been in furtherance of the alleged conspiracy.

In its opinion, the court below acknowledges that the test for obtaining a new trial on the basis of evidence that a Government witness had perjured himself at a trial resulting in the defendant's conviction is considerably less strict than the test for obtaining a new trial based on any other type of newly-discovered evidence. United States v. Silverman, 430 F. 2d 106, 119 (2d Cir. 1970), modified on different grounds, 439 F. 2d 1198, cert. den., 402 U.S. 953. See also United States v. Polisi, 416 F. 2d 573, 576 (2d Cir. 1969). Under the test applied where there is evidence of perjury, the defendant need only show that the evidence "might" have produced a different verdict. United States v. Silverman, supra; United States v. Polisi, supra.

Thereafter, however, the court below inserts without explanation the sentence -- "Nor is there evidence of prosecutorial misconduct, which, if present, would require the application of the Silverman standard," the insinuation being that prosecutorial misconduct is a sine qua non for the

application of the standard. If it is, it is not because the Silverman case so holds, or any other case decided by this Court since Silverman. It is true that in United States v. Marquez, 363 F. Supp. 802 (S.D.N.Y. 1973), Judge Weinfeld professed to see such a requirement in this Court's decision in United States v. De Sapio, 435 F.2d 272, 286 (1970), but, with all due respect to Judge Weinfeld, it does not appear that this Court was dealing with or thinking in terms of perjury in the De Sapio case. The basis for the motion for a new trial in that case was an attack on testimony previously given by a priest and a nun, which the defendant claimed to be patently mistaken, but certainly not perjurious.

Moreover, the view that a new trial should be granted if, as here, it is evident that the Government's key witness has committed perjury would seem to be in line with decisions elsewhere. Stamps v. United States, 406 F.2d 925, 928-929 (9th Cir. 1969); Arbuckle v. United States, 146 F.2d 657, 659-660 (U.S. App. D.C. 1944); Larrison v. United States, 24 F.2d 82 (7th Cir. 1928).

If, on the other hand, evidence of prosecutorial misconduct is needed in the present case, it is at hand.

Before Ron's trial, the Government had in its possession precisely the same evidence as that which it had before Lester's trial. Specifically, it knew that the earliest check in its possession, drawn to Hagins' order, on Ron's bank account at the First Israeli Bank, was the one for $4,600 (GX 34). It had not located any earlier check drawn on that bank account or on any other bank account, even though it had seized all of Ron's papers and had served subpoenas on every bank indicated by those papers. It should have known, therefore, before Ron's trial, that there was no earlier check for $5,000, such as the alleged check concerning which Hagins was permitted to testify at that trial. When the Government somewhat more carefully reviewed its evidence, before Lester's trial, it did not permit Hagins to make the same error at the second trial, but the damage had already been done.

In any event, even if the strictest test for a new trial based on newly-acquired evidence is applied to the change in Hagins' testimony at Lester's trial, it would seem to be met. Under that test, the defendant must show that the evidence would probably result in a different verdict. United States v. Silverman, supra; United States v. Polisi, supra; United States v. De Sapio, supra; United States v. Kahn, 472 F.2d 272, 287 (2d Cir.1973).

In the detailed recitation of facts, or alleged facts, contained in the opinion of the court below, it is only through Hagins that Ron is in any way connected with any conspiracy. Otherwise Ron appears only as some one who was acquainted with Lester, advanced money to him, introduced him to Beck and was repaid by him at the Franklin National Bank, where Ron and Beck were present when Lester represented himself to be the man whom he had said was his Canadian principal. Those limited facts are hardly inconsistent with the characteristics of a normal business relationship between two men.

It has never been suggested by the Government that Ron played the slightest part in the theft of any securities, or ever knew any of the persons who are claimed by the Government to have been responsible for any such theft. Nor has it ever been suggested that he played any part in the sale of any securities, except to introduce Lester to Beck, which, standing alone, is hardly an act referable to a crime or a conspiracy to commit a crime. All that Ron is supposed to have done is to have advanced some money to Lester to "buy time" with Hagins, Garner, et al. In the absence of Hagins' testimony, however, there is not the slightest evidence that

Ron knew that the checks he gave to Lester were to be used for any such purpose, if indeed they were used therefor.

In brief, without Hagins' perjurious testimony, it is respectfully submitted that upon a new trial there might well be insufficient evidence to allow the case against Ron to be presented to the jury.

POINT II

LESTER'S TESTIMONY AT HIS OWN TRIAL QUALIFIES AS NEWLY-DISCOVERED EVIDENCE.

It would be more than difficult to argue that if Lester's testimony were introduced at a new trial, such testimony would not result in a different verdict for Ron. The unassailable fact is that the same testimony at Lester's trial resulted in an acquittal, not only of Lester, but also of Beck and Champion.

It also seems clear that Lester's testimony, as recorded, may now be introduced at a new trial, even though Lester is dead. Mattox v. United States, 156 U.S. 237, 243 (1895); Kirby v. United States, 174 U.S. 47, 61 (1899);

Pointer v. Texas, 380 U.S. 400, 407 (1965).

Of course, the parties at Lester's trial did not include Ron, and, therefore, would not be precisely the same as those at a new trial. They did, however, include the Government, which had full opportunity at Lester's trial to cross-examine Lester, and which took advantage of that opportunity. Moreover, the issues at Lester's trial were precisely the same as they will be at a new trial, since Lester was tried on precisely the same charges as Ron. Under these circumstances, Lester's testimony may now be used against the Government by Ron, and, of course, when so used, in whole or in part, can be used by the Government against Ron.

> "The testimony in the prior proceeding can only be heard against a party to the proceeding who was there represented by counsel and who had an opportunity to cross-examine the witness. In addition, the issue must be the same in the two proceedings, and the witness must not be available at the time his prior testimony is offered." 2 Wright, Federal Practice and Procedure, § 412.

The only argument raised by the Government in the court below against Lester's testimony as a ground for a new trial was that such testimony is not truly "newly-discovered." That argument is based on the conceded fact that Ron certainly knew that Lester was a material witness, and either Ron or his trial counsel or both knew a good deal about what Lester might have testified, had Lester been willing to testify. That argument, however, does not answer the main thrust of Ron's point, which is that Lester was clearly not willing to testify prior to his own trial, so that his testimony was not available to Ron through circumstances entirely beyond Ron's control.

Ron's argument is hardly met by the references which appear in the opinion of the court below to the activities of Beck's "defense team" in Canada (A37). What those attorneys discovered when they went to Canada has already been indicated. They found out that Lester elected not to testify at his criminal trial in that country, and that he testified in the civil action against him only because he was under court order to do so. Subsequently, at their client's trial in this country, they learned from the Government that Lester

had refused to answer questions asked by the F.B.I. concerning the issues in the criminal trial in this country because the Government was not prepared to grant him immunity (Ct. Exh. 6).

Nor is it fair or reasonable to hypothesize, as does the court below, that Ron's trial counsel made a calculated decision to avoid introducing Lester's testimony at his client's trial on the premise that it would be better for Ron (goodness knows why) to concede Lester's guilt when arguing to the jury. An attorney can only be said to have made a calculated decision if he has a choice in the matter, and Ron's attorney had no such choice. He knew that Lester would not testify. What he really did when he conceded Lester's guilt was to make what he thought was the best of a bad deal, and, even then, it is more than arguable that he did not do so.

It is respectfully submitted that the closest the court below comes to meeting the thrust of Ron's position concerning Lester's testimony is to suggest that Ron's trial counsel might have moved for a severance in order to enable Ron to be

tried with Lester. Even that suggestion, however, is an empty one under the particular circumstances of this case. To have succeeded, the moving party would have had to demonstrate that some legitimate purpose would now be served by putting off Ron's trial until Lester was also available for trial. By definition the legitimate purpose in this instance had to be the availability of Lester's testimony in Ron's defense. Ron's counsel, however, was hardly in a position to persuade the court below that Lester would testify at his own criminal trial in this country when he had not done so at his own criminal trial in Canada, and had thereafter refused to answer the questions of the F.B.I. without first being granted immunity!

In brief, although it may be said that some portion, though by no means all, of what might have been Lester's testimony, had he been willing to testify at Ron's trial, was known before or during that trial, the fact remains that such testimony was not, through any fault of Ron or his counsel, available at that trial. In that respect, it is in no substantial way different from other types of evidence that are accepted as "newly-discovered" for the purpose of granting a new trial. One such type that readily comes to mind is the testimony of an

eye witness who is known to have seen a crime at close range, but whose identity is not ascertained at the time of the crime or at any time thereafter until subsequent to the conviction of one whose innocence, it is claimed, the eye witness can establish. It is respectfully submitted that what makes such evidence "newly-discovered" is essentially its prior lack of availability to the convicted defendant, which is precisely the situation respecting Lester's testimony at the time of Ron's trial.

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE REVERSED AND A NEW TRIAL GRANTED.

Respectfully submitted,

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